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Supreme Court, U.S.
FILED
SEP 20 2006
OFFICE OF THE CLERK

No. 06-97

In the Supreme Court of the United States

STOLT-NIELSEN, S.A., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners must seek enforcement of their conditional leniency agreement with the government in post-indictment rather than pre-indictment proceedings.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-21a, 22a-25a) are reported at 442 F.3d 177. The memorandum order of the district court (Pet. App. 34a-64a) is reported at 352 F. Supp. 2d 553.

JURISDICTION

The judgment of the court of appeals was entered on March 23, 2006. A petition for rehearing was denied on June 20, 2006 (Pet. App. 30a-31a). The petition for a writ of certiorari was filed on July 20, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners filed separate civil actions requesting, *inter alia*, an injunction barring the government from obtaining an indictment against petitioners for engaging

in collusive activity in the parcel tanker shipping services market. The district court enjoined the government from obtaining an indictment against petitioners for the collusive activity. Pet. App. 34a-64a. The court of appeals reversed and remanded. *Id.* at 1a-21a, 22a-25a.

1. In November 2002, the Antitrust Division of the Department of Justice (the Division) began investigating possible collusion in the parcel tanker shipping industry, which provides worldwide transportation of bulk liquid chemicals and other speciality liquids. Pet. App. 5a, 53a-56a. Petitioner Stolt-Nielsen, S.A., through its subsidiary, petitioner Stolt-Nielsen Transportation Group Ltd. (collectively SNTG), is one of the leading suppliers of parcel tanker shipping services. *Id.* at 4a. When the Division began its investigation, petitioner Richard B. Wingfield was Managing Director of Tanker Trading for SNTG. *Id.* at 4a, 8a. The Division's investigation was prompted by an article published in the *Wall Street Journal* reporting that SNTG was being sued by Paul O'Brien, its former general counsel. According to the article, O'Brien had alleged in his complaint that SNTG had been engaged in illegal collusive activity. *Id.* at 4a.

On November 22, 2002, SNTG contacted the Division about applying for leniency pursuant to the Division's Corporate Leniency Policy. Pet. App. 5a, 55a, 72a-75a. Under that policy, the Division agrees not to prosecute companies that report their illegal antitrust activity to the Division at an early stage, if certain qualifying conditions are satisfied. *Id.* at 5a; see *id.* at 72a-75a. On January 15, 2003, the Division and SNTG executed a conditional leniency agreement (the Agreement). *Id.* at 65a-71a.

The Agreement specified that it was "conditional and depend[ed] upon SNTG satisfying the conditions set forth" therein. Pet. App. 65a. SNTG represented in the Agreement that it had taken "prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity." *Id.* at 66a. SNTG's representations were expressly made "[s]ubject to verification" by the Division. *Id.* at 67a. SNTG also pledged, *inter alia*, to provide "a full exposition of all facts known to SNTG relating to the anticompetitive activity being reported." *Id.* at 66a.

The Division, in return, "agree[d] conditionally to accept SNTG into * * * the Corporate Leniency Program," pursuant to which the Division "agree[d] not to bring any criminal prosecution against SNTG for any act or offense committed prior to the date of [the Agreement] in connection with the anticompetitive activity being reported." Pet. App. 67a-68a. The Agreement expressly provided that, "[i]f the Antitrust Division at any time determines that SNTG has violated th[e] Agreement, th[e] Agreement shall be void," and the Division could then revoke SNTG's "conditional acceptance" into the Leniency Program and "*thereafter initiate a criminal prosecution against SNTG, without limitation.*" *Id.* at 68a (emphasis added).

In the weeks that followed the execution of the Agreement, the Division received evidence that SNTG had made false representations in the Agreement and had breached its duty to cooperate. The evidence indicated that, contrary to SNTG's representation that it had taken "prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity," Pet. App. 66a, SNTG in fact had continued to engage in collusive activity for several

months after SNTG's former general counsel had informed the company about SNTG's unlawful collusive trading practices. *Id.* at 8a, 157a-158a. On April 8, 2003, in light of that information, the Division suspended SNTG's obligations under the Agreement and notified SNTG that the Division was considering withdrawing the grant of conditional leniency. *Id.* at 157a-159a. On March 2, 2004, the Division withdrew its grant of conditional leniency. *Id.* at 8a.

2. In February 2004, SNTG and Wingfield filed actions in the United States District Court for the Eastern District of Pennsylvania, alleging that the Agreement prohibited the Division from obtaining an indictment against them. The complaints sought preliminary and permanent injunctive relief enjoining the Division from obtaining an indictment. Pet. App. 9a, 42a-43a.

On January 14, 2005, the district court permanently enjoined the government "from indicting or prosecuting [SNTG and Wingfield] for any violations of the Sherman Act, 15 U.S.C. § 1, up to and including January 15, 2003, in the parcel tanker industry." Pet. App. 51a; see *id.* at 34a-50a. The court rejected the government's argument that SNTG was not entitled to a pre-indictment judicial determination of its rights under the Agreement, and that SNTG instead should assert the Agreement as a defense in post-indictment proceedings. In the court's view, "if an indictment were later determined to have been wrongfully secured, it would be too late to prevent the irreparable consequence[]" of damage to SNTG's reputation. *Id.* at 45a & n.8. The court then concluded that the government should be enjoined from obtaining an indictment. *Id.* at 47a-50a.

3. The court of appeals reversed. Pet. App. 1a-21a, 22a-25a. The court concluded that "[s]eparation-of-

power concerns * * * counsel against using the extraordinary remedy of enjoining the Government from filing the indictments." *Id.* at 20a. Although there is a "narrow exception to this rule" when "the very act of filing an indictment" "may chill constitutional rights," the court explained, "this case does not implicate that concern." *Id.* at 20a, 23a. The court therefore was "guided by other cases" in which non-prosecution agreements have been construed "not [to] form the basis for enjoining indictments before they issue." *Id.* at 20a. Rather, the court reasoned, "immunity agreements that have promised not to charge or otherwise criminally prosecute a defendant, like the agreement at issue in this case, have * * * been construed to protect the defendant against conviction rather than indictment and trial." *Id.* at 14a.

That distinction, the court explained, "is grounded in the understanding that simply being indicted and forced to stand trial is not generally an injury for constitutional purposes but is rather 'one of the painful obligations of citizenship.'" Pet. App. 15a (quoting *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940)). Observing that an injunction normally is available only when there is no adequate legal remedy, the court explained that petitioners could "interpose the Agreement (as a defense to conviction) in a pre-trial motion," which is a "practical and efficient—and indeed complete—legal remedy." *Id.* at 19a-20a. The court therefore held that the district court "lacked authority to employ the extraordinary remedy of enjoining the Government's indictments of [SNTG] and Wingfield." *Id.* at 21a.

4. On July 20, 2006, petitioners filed with Justice Souter an application to recall and stay the mandate of the court of appeals pending this Court's disposition of

the petition for a writ of certiorari. On July 25, 2006, Justice Souter denied the application. The same day, petitioners re-filed the application with Justice Stevens, who, on August 2, 2006, referred the application to the full Court. On August 21, 2006, the Court denied petitioners' application. On September 6, 2006, a federal grand jury in the Eastern District of Pennsylvania returned an indictment charging petitioners with engaging in a combination and conspiracy to suppress competition in the parcel tanker shipping industry, in violation of 15 U.S.C. 1.

ARGUMENT

Petitioners contend (Pet. 10-11) that the Third Circuit's decision that federal courts generally cannot enjoin a federal indictment to enforce a non-prosecution agreement conflicts with the law in the Seventh Circuit. That contention lacks merit and does not warrant review.

1. The petition should be denied for the threshold reason that the claim it makes is now moot. See, *e.g.*, *Spencer* v. *Kemna*, 523 U.S. 1 (1998). Petitioners filed an action asserting that the Agreement prohibited the government from obtaining an indictment against them, and they accordingly sought an injunction barring the government from obtaining an indictment. The district court granted a permanent injunction. Pet. App. 51a. The court of appeals reversed, holding that petitioners have no entitlement under the Agreement to an injunction barring the government from obtaining an indictment against them, and that petitioners instead should assert the Agreement as a defense in post-indictment, pre-trial, proceedings. *Id.* at 19a.

The petition seeks this Court's review of whether "courts have the authority to determine the enforceability of non-prosecution agreements prior to indictment." Pet. 20. The petition makes clear throughout that the issue petitioners seek to raise is whether they are entitled to *pre*-indictment relief in the form of an injunction barring the government from obtaining an indictment against them. See Pet. 12-29. Petitioners contend that they have "a bargained-for interest in avoiding not only conviction, but indictment." Pet. 19.

After this Court denied petitioners' application for a stay and recall of the court of appeals' mandate, a federal grand jury returned an indictment against petitioners. Because the petition seeks this Court's review of whether petitioners were entitled to an injunction barring the government from obtaining an indictment against them, and because petitioners have now been indicted, the issue raised by the petition is moot. Additionally, there could be no basis for concluding that the issue raised by the petition is "capable of repetition, yet evading review." See, *e.g.*, *Kemna*, 523 U.S. at 17. That exception applies only if, *inter alia*, there is a "reasonable expectation that the same complaining party [will] be subject to the same action again." *Ibid.* (citation omitted) (alteration in original). There is no reasonable expectation that petitioners will again be indicted for the anticompetitive conduct encompassed by the indictment, or that the issue of petitioners' entitlement under the Agreement to an injunction barring their indictment will again be presented.

Even assuming, *arguendo*, that petitioners' indictment fails to render the petition moot, the fact of the indictment weighs strongly against granting certiorari. In light of petitioners' indictment, there is no longer any

practical significance to the issue whether petitioners are entitled to an injunction barring the government from obtaining an indictment against them. Petitioners, as the court of appeals explained, can now assert the Agreement as a defense in post-indictment, pre-trial proceedings.

2. Even apart from mootness considerations, certiorari should be denied. The court of appeals correctly determined that courts should not grant the extraordinary remedy of an injunction against a grand jury indictment based on petitioner's claim under a non-prosecution agreement.

a. The court of appeals' decision is fully consistent with prior decisions of this Court and other courts of appeals. Petitioners fail to cite any case in which a court has enjoined the federal government from obtaining an indictment against the target of an ongoing federal criminal investigation. See *Deaver* v. *Seymour*, 822 F.2d 66, 69-70 (D.C. Cir. 1987) (finding "no case" in which "a federal court [has] enjoined a federal prosecutor's investigation or presentment of an indictment," and observing that "subjects of federal investigation have never gained injunctive relief against federal prosecutors"); cf. *id.* at 68 (noting that this Court "in certain cases" has "permitted federal courts to issue injunctions against *state* court criminal proceedings that threatened federal constitutional rights").

Contrary to petitioners' argument (Pet. 12-16), the court of appeals' decision does not conflict with the Seventh Circuit's decision in *United States* v. *Meyer*, 157 F.3d 1067 (1998), cert. denied, 526 U.S. 1070 (1999). In that case, the defendant argued that his due process rights had been violated when the government re-indicted him without seeking a pre-indictment determina-

tion that he had breached an immunity agreement. The agreement "provided that, in exchange for [the defendant's] performance, the government would dismiss the charge currently pending against him and would not charge him with any other violations relating to the same criminal conspiracy or with other drug or money laundering violations." *Id.* at 1077.

The Seventh Circuit rejected the defendant's argument that he was entitled to a pre-indictment determination of breach instead of the post-indictment determination he had received. The court explained that "the benefit of [the defendant's] bargain" was "to avoid the risk of conviction"—not the risk of indictment—and that the post-indictment (but pre-trial) determination therefore had given him "all of the protection demanded by due process." *Meyer*, 157 F.3d at 1077. Although the court indicated in *dictum* that the "preferred procedure" would be for the government to seek a pre-indictment determination of whether a defendant has breached an immunity agreement, *ibid.*, the court made no suggestion of a *requirement* to seek a pre-indictment determination, much less that it could be appropriate to enjoin the government from obtaining an indictment. To the contrary, the court rejected the defendant's argument that he was entitled to a pre-indictment determination.[1]

As the court of appeals explained, Pet. App. 13a-14a, 24a, its decision is fully consistent with the Seventh Circuit's decision in *Meyer*. As in *Meyer*, the court of appeals here rejected petitioners' contention that they are

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[1] Accord *United States* v. *Attaya*, 864 F.2d 1324, 1330 n.9 (7th Cir. 1988) (observing that a pre-indictment hearing may be preferable absent "good cause for immediate reindictment," but acknowledging that "a pre-indictment hearing is not a constitutional requirement").

entitled to a pre-indictment determination of whether they breached the Agreement. The court instead held, consistent with *Meyer*, that the Agreement protects petitioners against conviction rather than against indictment, and that petitioners accordingly can assert the Agreement as a defense in post-indictment proceedings. *Id.* at 14a-15a, 19a-20a.

b. As the court of appeals explained, Pet. App. 14a-15a, 20a, no court has held that a party to an agreement like the one in this case holds any entitlement to an injunction barring indictment. Indeed, petitioners have cited no case in which a federal court has held that any immunity, leniency, or non-prosecution agreement, regardless of its particular wording, granted a right to have a court enjoin the government from obtaining an indictment or furnished a basis for a court to do so.[2]

This Court, nearly one century ago, construed an immunity statute providing that "[n]o person shall be prosecuted [for any conduct] * * * concerning which he may testify." *Heike* v. *United States*, 217 U.S. 423, 431 (1910). The Court concluded that the provision conferred immunity only "as a defense" to "successful prosecution," not an absolute immunity from standing trial. *Ibid.* The Agreement in this case similarly set forth that "the Antitrust Division agrees not to bring any criminal

[2] Petitioners incorrectly suggest (Pet. 28-29) that *United States* v. *Minnesota Mining & Manufacturing Co.*, 551 F.2d 1106, 1111-1112 (8th Cir. 1977), held that the non-prosecution agreement at issue in that case granted a right not to be indicted. But that case involved a *post*-indictment challenge, not a pre-indictment challenge. The Eighth Circuit merely held that, because "the defendants fully discharged their obligations under the agreement, the Government [was] bound to fulfill its responsibility" not to prosecute. *Id.* at 1111 (footnote omitted). The court of appeals' decision in this case permits petitioners to seek a similar resolution in post-indictment proceedings. See Pet. App. 21a n.7.

prosecution against SNTG." Pet. App. 68a. Such agreements have uniformly been construed to provide a defense to successful prosecution rather than an absolute immunity from indictment. *Id.* at 14a; see, *e.g.*, *United States* v. *Bailey*, 34 F.3d 683, 690-691 (8th Cir. 1994); *United States* v. *Gerant*, 995 F.2d 505, 509 (4th Cir. 1993); *Meyer*, 157 F.3d at 1071, 1077; *United States* v. *Bird*, 709 F.2d 388, 392 (5th Cir. 1983).

Petitioners identify nothing in the Agreement at issue in this case that could justify departing from the general rule. To the contrary, the Agreement makes explicit that, "[i]f the Antitrust Division at any time determines that SNTG has violated this Agreement," the "Agreement shall be void" and the "Division may revoke the conditional acceptance of SNTG into the Corporate Leniency Program," in which event the "Division may * * * *initiate a criminal prosecution against SNTG, without limitation.*" Pet. App. 68a (emphasis added). That language expressly reinforces that, if the Division determines that SNTG has violated the Agreement, the Agreement affords no protection against initiating a prosecution by means of indictment. Petitioners' contention that they have a right under the Agreement to insist upon pre-indictment judicial review is particularly without merit because the Agreement expressly preserves the Division's right to proceed in the first instance based on its *own* determination of a violation, with no suggestion of any requirement for a prior judicial determination. See *United States* v. *Verrusio*, 803 F.2d 885, 889-890 n.3 (7th Cir. 1986) (if a non-prosecution agreement "does not require the government to follow a particular procedure in the event that it believes [the defendant] breached his obligations," the court "will not 'imply as a matter of law a term which the parties

themselves did not agree upon'") (quoting *United States* v. *Benchimol*, 471 U.S. 453, 456 (1985) (per curiam)).

Because an agreement like the one at issue here affords no entitlement to avoid an indictment, the proper means of enforcing such an agreement is by invoking it pre-trial as a defense to conviction and moving to have the indictment dismissed and the prosecution terminated, not by seeking to enjoin the government from obtaining an indictment in the first place. See Pet. App. 19a-20a. That conclusion is fortified by the recognition that "[s]eparation-of-power[s] concerns * * * counsel against using the extraordinary remedy of enjoining the Government from filing * * * indictments," especially, as here, in the absence of any claim that "the very act of filing an indictment" "may chill constitutional rights." *Id.* at 20a, 24a; see *United States* v. *Nixon*, 418 U.S. 683, 693 (1974) (observing that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case"); *United States* v. *Cox*, 342 F.2d 167, 171 (5th Cir.) (en banc) ("It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions."), cert. denied, 381 U.S. 935 (1965).

c. Petitioners err in relying (Pet. 23-25) on this Court's decisions in *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86 (1949), and *Truax* v. *Raich*, 239 U.S. 33 (1915). Those decisions, contrary to petitioner's characterization, do not hold that courts generally may enjoin the government from obtaining an indictment whenever an indictment might adversely affect the property interests of the potential defendant. See Pet. 24. The decisions involved the particular context of a facial, pre-enforce-

ment challenge to the validity of a federal regulation (*Hynes*) and a state law (*Truax*). Although the Court observed that an injunction against enforcement of the laws was warranted when essential to protecting property rights, see *Hynes*, 337 U.S. at 98-99; *Truax*, 239 U.S. at 38-39, the Court did not purport generally to sanction the entry of an injunction barring a prosecutor from obtaining an indictment against the target of an ongoing investigation.

Rather, those cases involved circumstances in which the Court determined that, because the subjects of the challenged laws would be chilled from risking violation of the laws, there was no practical opportunity to raise a post-enforcement challenge "in an ordinary criminal proceeding." *Hynes*, 337 U.S. at 99; see *Truax*, 239 U.S. at 37-39. The Court therefore approved a pre-enforcement action for an injunction against enforcement of the allegedly invalid laws at issue on the basis that affected individuals would have no adequate legal remedy. *Hynes*, 337 U.S. at 99; *Truax*, 239 U.S. at 39; see Pet. App. 23a. Here, by contrast, as in any case raising the question of the enforceability of a non-prosecution or immunity agreement, petitioners "have a practical and efficient—and indeed complete—legal remedy available to them, *i.e.*, access to a federal forum post-indictment in which they may assert the Agreement as a defense." *Id.* at 20a. In such circumstances, nothing in *Hynes* or *Truax* supports enjoining the government from obtaining an indictment. See, *e.g.*, *Douglas* v. *City of Jeannette*, 319 U.S. 157, 163 (1943) (noting "familiar rule that courts of equity do not ordinarily restrain criminal prosecutions" because lawfulness of prosecution "may be determined as readily in the criminal case" itself "as in a suit for an injunction").

d. Finally, the court of appeals' conclusion that petitioners must enforce the Agreement in post-indictment rather than pre-indictment proceedings is consistent with this Court's recognition of the "possibility that any citizen, no matter how innocent, may be subjected to a * * * criminal prosecution and put to the expense of defending himself." *Heike*, 217 U.S. at 432. As the Court has explained, "[b]earing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940); see *Deaver*, 822 F.2d at 69 ("Although it is surely true that an innocent person may suffer great harm to his reputation and property by being erroneously accused of a crime, all citizens must submit to a criminal prosecution brought in good faith so that larger societal interests may be preserved."). The Agreement, by specifying that the "Division may * * * initiate a criminal prosecution against SNTG, without limitation" upon "determin[ing] that SNTG has violated [the] Agreement," Pet. App. 68a, makes clear that petitioners possessed no special entitlement to avoid criminal prosecution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2006